APPENDIX

A. Opinion of the United States Court of Appeals for the Fifth Circuit, No. 01-41395; *David Ray Harris v. Janie Cockrell, Director, Texas Department of Criminal Justice, Institutional Division* (On Appeal from the United States District Court for the Eastern District of Texas (1:92-CV-167)), published at 313 F.3d 238 (5th Cir. 2002)

B. Judgment, No. 01-41395

C. Order Denying Petition of Rehearing and Rehearing En Banc, No. 01-41395

E. Report and Recommendation of United States Magistrate Judge, C.A. No. 1:92-CV-167

F. Memorandum Opinion, C.A. No. 1:92-CV-167

G. 28 U.S.C. §2254 (prior to the amendments in 1996 of the Antiterrorism and Effective Death Penalty Act)

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-41395

U.S. COURT OF APPEALS
FILED
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CHARLES R. FULBRUGE
CLERK

DAVID RAY HARRIS,

Petitioner-Appellee-
Cross-Appellant,

VERSUS

JANIE COCKRELL,
DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE,
INSTITUTIONAL DIVISION,

Respondent-Appellant-
Cross-Appellee.

Appeals from the United States District Court
for the Eastern District of Texas

Before JOLLY, SMITH, and EMILIO M. GARZA, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

The State of Texas appeals the grant of a writ of habeas corpus pursuant to 28 U.S.C. § 2254. The petitioner, David Harris, crossappeals the rejection of his claims that the jury in his capital trial was unconstitutionally precluded from giving mitigating effect to evidence of his alcoholism and that the admission of evidence of an extraneous offense of which he had been acquitted denied him a fair trial. We affirm in part, reverse in part, and render judgment in favor of the state.

Roxanne Lockard, were sleeping. Armed with a revolver, Harris went into the bedroom and awakened them. After instructing Mays to lock himself in the bathroom, Harris led Lockard out of the apartment at gunpoint and directed her to get into his truck.

Mays emerged from the apartment with a gun, and the two men exchanged fire. According to Harris, Mays shot first, hitting Harris in the neck, then in the shoulder, before Harris began shooting at Mays. After shooting Mays several times, once at close range, Harris left. He was found guilty of capital murder.

This appeal raises several claims related to the conduct of the sentencing phase of the trial. The state appeals the district court's grant of habeas relief that was based on two of Harris's claims: first, that the special instructions given to the jury failed to provide an adequate vehicle for the jury to give effect to Harris's evidence of provocation; and second, that the failure of counsel to present certain items of potentially mitigating evidence constituted ineffective assistance. Harris crossappeals the rejection of his additional claims that the special issues were unconstitutionally flawed in that they precluded the jury from giving effect to evidence

of Harris's alcoholism; that the prosecutor's allegedly improper closing argument during the guilt-innocence phase denied Harris a fair trial; and that Harris was denied a fair sentencing determination by the admission of evidence of an extraneous offense of which he had been acquitted. The district court erred in deciding that the jury instructions at the punishment phase provided an insufficient vehicle for the jury to give effect to Harris's mitigating evidence related to provocation and that Harris was prejudiced by ineffective assistance of counsel. We affirm the rejection of the remaining claims.

II.

At the sentencing phase, the jury answered affirmatively the three special issues related to deliberateness, future dangerousness, and inadequate provocation. Consequently, Harris was sentenced to death. Citing *Penry v. Lynaugh ("Penry I")*, 492 U.S. 302 (1989), and *Penry v. Johnson ("Penry II")*, *532* U.S. 782 (2001), Harris contended that the Texas special issues frame work was unconstitutional as applied to his case, because it precluded the jury from giving effect to potentially mitigating evidence related to provocation by the victim and Harris's alcohol abuse. The district court granted relief on the claim based on the evidence of provocation and rejected the claim as to evidence of alcohol abuse. We conclude that the special issues permitted the consideration of both types of mitigating evidence.

A.

In *Penry I*, 492 U.S. at 328, the Court held that the Texas special issues were constitutionally deficient as applied to the defendant, because they failed to provide the sentencing jury with an adequate means of giving effect to

mitigating evidence of severe mental retardation and abuse. Harris claims that these special issues likewise precluded the jury from giving mitigating effect to his evidence of alcohol abuse, in violation of *Penry I*.

To form the basis of a *Penry* claim, mitigating evidence "must demonstrate a 'uniquely severe permanent handicap[] with which the defendant was burdened through no fault of his own.'"[1] Under this definition, neither evidence of alcoholism nor evidence of intoxication at the time of the offense constitutes *Penry* evidence.[2]

The jury was able to give mitigating effect to the evidence of Harris's alcoholism through its answers to the first and second special issues. Evidence of intoxication can be fully considered under the first special issue,[3] which

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[1] *Turner v. Johnson*, 106 F.3d 1178, 1189 (5th Cir. 1997) (quoting *Graham v. Collins*, 950 F.2d 1009, 1029 (5th Cir. 1992) (en banc), *aff'd*, 506 U.S. 461 (1993)).

[2] *See Lackey v. Scott*, 28 F.3d 486, 489 (5th Cir. 1994) ("Unlike Penry's mental retardation and childhood abuse, 'voluntary intoxication is not the kind of uniquely severe permanent handicap[ ] with which the defendant was burdened through no fault of his own that requires a special instruction to ensure that the mitigating effect of such evidence finds expression in the jury's sentencing decision.'" (quoting *Cordova v. Collins*, 953 F.2d 167, 170 (5th Cir. 1992) (internal quotes omitted)); *Tucker v. Johnson*, 115 F.3d 276, 282 5th Cir. 1997) ("[S]elf-inflicted chronic drug and alcohol abuse and the resulting arrested emotional development do not constitute a unique handicap 'with which the defendant was burdened through no fault of his own.'").

[3] The first special issue reads as follows: "Was the conduct of the defendant that caused the death of the deceased committed

asked the jury to evaluate the deliberateness of Harris's conduct.[4] Furthermore, to the extent that "alcoholism has independent mitigating weight apart from intoxication at the time of a crime," *James*, 987 F.2d at 1121 n.6, the second special issue, which relates to future dangerousness,[5] provided a means forgiving mitigating effect to Harris's evidence that he is an alcoholic. *See Id.* at 1121.

Trial counsel presented testimony at the sentencing phase that Harris's history of violent conduct stemmed from his alcoholism, which could be brought under control. The jury reasonably could have considered this testimony when evaluating whether Harris was a continuing danger to society. *See Id.* Therefore, the district court was correct in rejecting Harris's *Penry* claims based on his mitigating evidence related to alcoholism and intoxication.

B.

Citing *Penry II*, the district court held that the third special issue[6] did not provide the jury with an effective means for consideration of evidence that Mays fired his

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deliberately and with the reasonable expection *[sic]* that the death of the deceased or another would result?"

[4] *Tucker*, 115 F.3d at 282; *Lackey*, 28 F.3d at 489; *James v. Collins*, 987 F.2d 1116, 1121(5th Cir. 1993); *Cordova v. Collins*, 953 F.2d at 170.

[5] The second special issue reads: "Is there a probability that the defendant will commit criminal acts of violence that will constitute a continuing threat to society?"

[6] The third special issue poses the question: "Was the conduct of the defendant in killing the deceased unreasonable in response to the provocation, if any by the deceased?"

weapon first. In *Penry II*, 532 U.S. at 789, jurors were given the same three special issues submitted in this case. They also were given a supplemental "nullification instruction," directing jurors to answer any special issue in the negative, irrespective of the evidence on that special issue, if they believed the mitigating circumstances rendered a life sentence more appropriate than death. *Id.* at 789-90. In essence, the jury could give effect to the nullification instruction only by answering one of the special issues untruthfully. *Id.* at 799. The Court held that this nullification instruction failed to provide an adequate vehicle for the jury to make a reasoned moral response to Penry's mitigating evidence, because it "it made the jury charge as a whole internally contradictory, and placed law-abiding jurors in an impossible situation." *Id.*

The district court noted that by rejecting Harris's defense of voluntary manslaughter, the jury found that the killing was not done "under the immediate influence of passion based upon adequate cause" At the sentencing phase, the court continued, a juror who believed that Harris should receive a life sentence instead of the death penalty, because the victim shot first, could act on that belief only by answering in the negative the third special issue, which addresses whether the defendant's conduct in killing the victim was reasonable in light of any provocation.

The court reasoned that such a response would be inconsistent with the jury's rejection of Harris's manslaughter defense and that a juror could not logically answer the third special issue in the negative. As a result, the court concluded, the jury could not give mitigating effect to the evidence of provocation.

Penry II is inapplicable here, because the jurors were not directed to give untruthful responses or to violate their oaths to give effect to the mitigating evidence. There are no internal contradictions of the sort created by the nullification instruction considered in *Penry II*. Further, even if *Penry II* were applicable, the district court erred in holding that a negative answer to the third special issue is inconsistent with the jury's rejection of the voluntary manslaughter defense at the guilt-innocence phase.

The state trial court's construction of the third special issue defines the provocation inquiry more broadly than is the case with the guilt-innocence inquiries of self-defense and manslaughter.[7] In other words, a reasonable jury could find that the evidence of provocation was insufficient to justify a verdict of voluntary manslaughter but sufficient to justify a negative answer to the third special issue. Indeed, Harris's trial counsel specifically told the jurors, during argument at the punishment phase, that their guilty verdict did not foreordain an affirmative answer to the third-special issue. Therefore, the district court erred in granting relief to Harris on this issue.

III.

The district court held that counsel's failure to present certain items of potentially mitigating evidence at the punishment phase constituted ineffective assistance of counsel. In particular, the court cited the failure of trial counsel to introduce evidence concerning Harris's troubled

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[7] *See Evans v. State*, 601 S.W.2d 943, 946 (Tex. Crim. App. 1980); *Brown v. State*, 554 S.W.2d 677, 678-79 (Tex. Crim. App. 1977).

childhood and family background, drug and alcohol problems, and prior prison record.

We need not decide this question, for, even assuming *arguendo* the correctness of the court's substituted findings and its conclusion that counsel's conduct constituted deficient performance, the court erred in holding that this performance prejudiced the defense under *Washington*, 466 U.S. at 694, which requires the claimant to demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." In the context of a claim that counsel rendered ineffective assistance by failing to present evidence at the punishment phase of a capital murder trial, the inquiry is whether there is a reasonable probability that, had the evidence been presented, it would have altered the punishment verdict.[8]

The district court based its finding of prejudice on its comparison of the circumstances of Harris's case to those in two similar cases, *Duhamel v. Collins*, 955 F.2d 962 (5th Cir. 1992), and *Williams v. Taylor*, 529 U.S. 362 (2000). Harris's mitigating evidence is similar to that which this court characterized as "weak" in *Duhamel*, 955 F.2d at 966. The proposed evidence of Harris's mental retardation is his IQ score of 88 in the seventh grade. This is not strongly

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[8] *See Washington*, 466 U.S. at 695; *Mann v. Scott*, 41 F.3d 968, 983-84 (5th Cir. 1994).

mitigating evidence such that its omission is likely to cause prejudice.[9]

Similarly, the evidence of an abusive childhood is less than compelling. Harris's evidence of abuse includes testimony that, although he was raised in a stable family environment, his father played favorites among his children and blamed Harris for the death of his brother. This evidence pales in comparison to that omitted by the trial attorneys in *Williams,* in which the Court held that the defendant had proved prejudice. The mitigating evidence available there demonstrated that the defendant's parents were imprisoned for criminal neglect of their children, that defendant had been repeatedly beaten by his father, that while his parents were imprisoned he spent time in an abusive foster home, and that he had been returned to the custody of his abusive parents upon their release from prison. *Williams,* 529 U.S. at 395-96.

The jury could have viewed much of the evidence omitted by Harris's trial counsel as either mitigating or aggravating. Testimony regarding Harris's family background would reveal that despite some emotional abuse, he came from a stable family environment. In addition, evidence relating to his "good" prison record would include a description of his violent behavior while incarcerated, and taken as a whole likely would be aggravating rather than

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[9] *See Duhamel,* 955 F.2d at 966 (holding that the omission of evidence that the defendant "was moderately mentally retarded with an IQ of 56" did not result in prejudice).

mitigating. The failure to present such double-edged evidence is not prejudicial.[10]

Finally, there is overwhelming evidence of violence in Harris's background, which negates the likelihood that additional evidence would have resulted in a different outcome. *See Santellan v. Cockrell,* 271 F.3d 190, 198 (5th Cir. 2001), *cert. denied,* 122 5. Ct. 1463 (2002). In light of the overall weakness of the proposed mitigating evidence, and the fact that its introduction would have resulted in the presentation of additional evidence of Harris's past violent conduct, there is no reasonable probability that the presentation of this additional evidence would have altered the outcome of the punishment verdict. Therefore, Harris failed to demonstrate prejudice, and the district court erred in granting relief on his claim of in effective assistance.

IV.

Harris contends that his right to a fair trial was compromised by the prosecutor's improper closing arguments at the guilt-innocence phase of the trial. Specifically, Harris complains that the prosecutor improperly asked the jury to convict him on the basis of the alleged expectations and knowledge of the community. The following exchange forms the basis of his claim:

> Mr. McWilliams [the prosecutor]: Ladies and gentlemen, there's one verdict that's proper in this case. You've known it since yesterday, the verdict

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[10] *See, e.g., Ransom v. Johnson,* 126 F.3d 716, 723-24 (5th Cir. 1997); *Cockrum v. Johnson,* 119 F.3d 297, 301, 303-05 (5th Cir. 1997); *Faulder v. Johnson,* 81 F.3d 515, 5 19-20 (5th Cir. 1996).

that family and those police officers and the people of Jefferson County know is proper in this case —

Mr. Powell [defense]: Your Honor, we would object to counsel arguing that the jury should base their decision on the expectation of anybody, except on the evidence.

The Court: Sustained.

Mr. Powell: We would further request, Your Honor, that the Court instruct the jury to disregard Mr. McWilliams' statement.

The Court: So instructed.

Mr. McWilliams: It's the verdict that we know you will return, because it's justice in this case. It's not justice because I say it is. It's justice because you know it from the evidence you have here. . . . That verdict is guilt of Capital Murder.

Even if Harris is correct that the prosecutor's statements were improper, prosecutorial remarks are a sufficient ground for habeas relief only if they are so prejudicial that they render the trial fundamentally unfair."[11] Such unfairness exists

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[11] *Ortega v. McCotter*, 808 F.2d 406, 410 (5th Cir. 1987) (quoting *Whittington v. Estelle*, 704 F.2d 1418, 1421 (5th Cir. 1983)); *Kirkpatrick v. Blackburn*, 777 F.2d 272, 281(5th Cir. *1985);see also Jackson v. Johnson*, 194 F.3d 641, 653 (5th Cir. 1999) ("[T]he appropriate inquiry is . . . whether the prosecution's comments so infected the trial with unfairness that there is a

> "only if the prosecutor's remarks evince 'either persistent and pronounced misconduct or. . . the evidence was so insubstantial that (in probability) but for the remarks no conviction would have occurred.'"[12]

The prosecutor's remarks were neither repeated nor pronounced,[13] and in light of the considerable evidence of

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reasonable probability that the result would have been different if the proceeding had been conducted properly.").

[12] *Kirkpatrick*, 777 F.2d at 281 (quoting *Whittington*, 704 F.2d at 1421); *see also Menzies v. Procunier*, 743 F.2d 281, 288-89 (5th Cir. 1984) ("[A]prosecutor's improper argument will, in itself, exceed constitutional limitations in only the most 'egregious cases.'" (quoting *Houston v. Estelle, 569* F.2d 372, 382 (5th Cir. 1978)).

[13] In an attempt to create the impression that the contested remarks were repeated, Harris quotes the prosecutor in misleading fashion. Specifically, Harris quotes the prosecutor's remarks after the initial objection was sustained as follows: "It's [the verdict desired by the family, police, and the people] the verdict we know you will return . . . ." The descriptive aside inserted into this quote is misleading, because it is not apparent that the prosecutor is using the pronoun "it" to incorporate the preceding objectionable statements appealing to community expectations.

In fact, the context omitted by Harris supports a very different construction of the remarks: "It's the verdict that we know you will return, because it's justice in this case. It's not justice because I say it is. It's justice because you know it from the evidence you have here . . . . That verdict is guilt of Capital Murder." When the statement is viewed in its entirety, the most reasonable reading is that "it" refers to a verdict of guilty, not the verdict expected by the community.

guilt, there is no reasonable probability that, in their absence, the result would have been different. That is, "we cannot say that the prosecutor's remarks in this case were a crucial, critical, highly significant factor upon which the jury based its verdict of guilty." Accordingly, those statements did not render Harris's trial fundamentally unfair.

V.

Harris contends that he was deprived of a fair sentencing determination by the introduction of evidence concerning a crime for which he had been indicted but acquitted. During the sentencing phase, the state introduced evidence that Harris had been charged with burglary, robbery, attempted robbery, and kidnaping. He eventually was acquitted of kidnaping and argues that the introduction of this evidence was contrary to the collateral estoppel aspect of double jeopardy and thus constituted a violation of his due process rights.

The introduction of evidence of extraneous offenses of which the defendant has been acquitted is consistent with due process. *Vega v. Johnson,* 149 F.3d 354 (5th Cir. 1998). Although due process requires the application of collateral estoppel, *Ashe v. Swenson,* 397 U.S. 436 (1970), that doctrine "does not preclude [the state] from relitigating an issue when it is presented in a subsequent action governed by a lower standard of proof," *Dowling v. United States,* 493 U.S. 342, 349 (1990).

Because "extraneous offenses offered at the punishment phase of a capital trial need not be proven beyond a reasonable doubt," *Vega,* 149 F.3d at 359, the relevant standard of proof necessarily was lower than that at Harris's criminal trial for kidnaping. Collateral estoppel therefore did

not preclude the introduction of evidence pertaining to these charges, and Harris's due process rights were not violated. *See Vega,* 149 F.3d at 359.

In summary, we REVERSE the grant of habeas relief, AFFIRM the denial of all remaining claims, and RENDER judgment in favor of the state.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-41395

D.C. Docket No. 1:92-CV-167

U.S. COURT OF APPEALS
FILED
NOV 18 2002
CHARLES R. FULBRUGE III
CLERK

DAVID RAY HARRIS

Petitioner – Appellee-Cross-Appellant

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

Respondent – Appellant-Cross-Appellant

FILED
US. DISTRICT COURT
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TX EASTERN – BEAUMONT
By /s/

Appeals from the United States District Court for the Eastern District of Texas, Beaumont.

Before JOLLY, SMITH, and EMILIO M. GARZA, Circuit Judges.

J U D G M E N T

This cause was considered on the record on appeal and the briefs on file.

It is ordered and adjudged that the judgment of the District Court is affirmed in part, reversed in part, and rendered.

ISSUED AS MANDATE: DEC 24 2002

A true copy
Test
Clerk, U. S. Court of Appeals, Fifth Circuit
By: /s/
Deputy
New Orleans, Louisiana
DEC 24 2002

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 01-41395

U.S. COURT OF APPEALS
FILED
DEC 16 2002
CHARLES R. FULBRUGE III
CLERK

DAVID RAY HARRIS

Petitioner – Appellee-Cross-Appellant

v.

JANIE COCKRELL, DIRECTOR, TEXAS DEPARTMENT OF CRIMINAL JUSTICE, INSTITUTIONAL DIVISION

Respondent – Appellant-Cross-Appellant

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Appeals from the United States District Court for the Eastern District of Texas, Beaumont

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ON PETITION FOR REHEARING AND REHEARING EN BANC

(opinion 11/18/02, 5 Cir., _____, _____ F.3d _____)

Before JOLLY, SMITH, and EMILIO M. GARZA, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. and 5TH CIR. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FED. R. APP. P. and 5TH CIR. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

FILED – CLERK
US. DISTRICT COURT
01 SEP 27 PM 2:26
TX EASTERN – BEAUMONT
By /s/

DAVID RAY HARRIS, Petitioner,	§	
	§	C.A. No. 1 :92-CV-167
vs.		
	§	Judge William Wayne Justice
GARY JOHNSON, Director, Texas Department of Criminal Justice, Institutional Division, Respondent.	§ § §	

ORDER AND JUDGMENT

This matter came before the Court on the June 25, 2001, Report and Recommendation of the Honorable Wendell C. Radford, United States Magistrate Judge, to grant in part Petitioner David Ray Harris' petition for a writ of *habeas corpus*. The Court has entered a Memorandum Opinion explaining the reasons for its decision. The Recommendation of the United States Magistrate Judge shall be, and is hereby,

ACCEPTED by the Court. Respondent's Motion for Summary Judgment shall be, and is hereby, **GRANTED IN PART** and **DENIED IN PART.** It shall be, and is hereby,

ADJUDGED that the Petition for a writ of *habeas corpus* is **GRANTED IN PART**. It is further

ORDERED that a writ of *habeas corpus* issue to Respondent Director of the Texas Department of Criminal Justice, Institutional Division, directing him to release Petitioner from custody unless the State of Texas, within 180 days from the date of entry of this Order and Judgment, either reforms Petitioner's sentence from death to life imprisonment, or vacates Petitioner's death sentence and commences new proceedings to determine the appropriate punishment for Petitioner's capital murder conviction.

SIGNED this 25th day of September, 2001.

William Wayne Justice
Senior United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
BEAUMONT DIVISION

FILED – CLERK
US. DISTRICT COURT
01 JUN 25 PM 2:56
TX EASTERN – BEAUMONT
By /s/

DAVID RAY HARRIS,	§	
vs.	§	No. 1 :92-CV-167
DIRECTOR, TDCJ-ID	§	

REPORT AND RECOMMENDATION
OF UNITED STATES MAGISTRATE JUDGE

Petitioner David Ray Harris, ("Harris") an inmate confined to the Texas Department of Criminal Justice, Institutional Division, filed a petition for a writ *of habeas corpus* pursuant to 28 U.S.C. § 2254. Harris challenged his capital murder conviction and the death sentence imposed in the Criminal District Court of Jefferson County, Texas in cause No. 46204, styled *The State of Texas v. David Ray Harris.*

On December 6, 1999, this case was referred pursuant to 28 U.S.C. § 636(b)(l) (B) the Amended Order for the Adoption of Local Rules for the Assignment of Duties to United States Magistrate Judges for proposed findings and recommendations for the disposition of the case. The Court gave the parties the opportunity to submit additional pleadings before submitting its proposed findings and recommended disposition.

INTRODUCTION

On September 1, 1985, Harris broke into an apartment rented by Mark Mays. He ordered Mays into the bathroom at gunpoint and kidnaped Mays' girlfriend Roxanne Lockard. After Harris left, Mays escaped from the bathroom, armed himself and pursued Harris. A gun battle ensued in the parking lot, and Harris, who sustained at least two wounds himself, eventually killed Mays. Powder burns on Mays' head indicated that he was shot once from between a distance of one to two feet. Harris then fled the scene alone. Four days later, Harris was arrested for driving while intoxicated. When the arresting officer realized that Harris was wounded and had a stolen pistol under his seat, the officer arranged for Harris' wounds to be treated and questioned him about the theft of the gun and his wounds. During this questioning, detectives investigating the Mays killing were brought in to question Harris. Eventually Harris admitted his involvement in the kidnaping and shooting.

Harris was convicted of capital murder under Texas Penal Code §19.03 (a) (2), the murder of Mays having been committed in the course of committing another felony, the kidnaping of Lockard. In the punishment phase of he trial, the prosecution offered evidence of Harris' extensive criminal history, as well as testimony of psychiatrist who opined that, based upon that history and the facts of the current offense, there was a substantial risk that Harris would commit future violent crimes. Harris presented testimony from both his alcohol counselor and his parole officer that there was a direct relationship between his use of alcohol and his criminal behavior, and that he was a nice person when not drinking. His parole officer further testified that she did not believe that the death penalty was appropriate in his case.

The jury answered affirmatively the three special issues necessary to impose the death penalty pursuant to Texas Code of Criminal Procedure art. 37.071, finding that Harris' conduct that caused Mays' death was committed deliberately and with the intention that death would result, that there is a probability that Harris would commit criminal acts of violence that would constitute a continuing threat to society, and that Harris' conduct in killing Mays was unreasonable in response to the provocation, if any, by Mays. On April 28, 1985, the trial judge sentenced Harris to death.

Harris' appeal was denied by Texas Court of Criminal Appeals on September 13, 1989. *Harris v. State,* 784 S.W.2d 5 (Tex. Crim. App. 1989), *cert.. denied,* 494 U.S. 1090 (1990). His state application for a writ of *habeas corpus* was denied on December 18, 1991. *Ex parte Harris,* 825 S.W.2d 120 (Tex. Crim. App. 1991). He filed his federal petition on April 28, 1992.

PROPOSED FINDINGS

Harris raised eight claims in his federal petition:

1. The jury was precluded from considering mitigating evidence in the record.

2. The jury was precluded from considering mitigating evidence not in the record.

3. The trial judge denied his instruction on voluntary manslaughter.

4. The prosecutor made improper closing argument.

5. His confession was involuntary.

6. The terms in the three special issues propounded to the jury at the punishment phase of his trial were not properly defined.

7. His trial and appellate counsel provided ineffective assistance.

8. The admission of evidence of his other offenses and of psychiatric testimony regarding his future dangerousness denied him a fair trial.

1. Whether the jury was precluded from considering mitigating evidence in the record

Harris' first claim is that Tex. Code Crim. Pro. art. 37.071, which limits the jury's role at the punishment phase of the trial to deciding three questions in order to determine whether to impose the death penalty, did not allow it to adequately consider and weigh the mitigating factors he presented, which included his youth, his intoxication, both at the time of the crime and during his previous criminal behavior, his cooperation with the police, his remorse, the fact that the victim had shot first, and the fact that he was alcoholic and drug dependent but was attending counseling.

In *Penry v. Lynaugh,* 492 U.S. 302 (1989), the United States Supreme Court held that art. 37.071 did not allow the jury the opportunity to adequately consider and weigh evidence that a defendant was mentally retarded. The Fifth Circuit has since held, however, that in contrast to mental retardation, a jury does have the opportunity to consider and to weigh evidence of a defendant's intoxication, alcoholism and remorse when it determines whether the defendant acted deliberately and with the intention that death would result from his actions. *See e.g. James v. Collins,* 987 F.2d 1116, 1121 (5th Cir.), *cert. denied,* 509 U.S. 947 (1993). It has also held that a jury has the opportunity to consider and

weigh evidence of a defendant's youth when it determines whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society, *see Graham v. Collins,* 950 F.2d 1009, 1029 (5th Cir. 1992), *aff'd.,* 506 U.S. 461 (1993), as well as to weigh evidence of a defendant's cooperation with the authorities in the context of that same issue. *See Wilkerson v.* Collins, 950 F.2d 1054, 1062 (5th Cir. 1992), *cert. denied,* 509 U.S. 921 (1993).

The Fifth Circuit has not addressed whether under art. 37.071 a jury has the opportunity to give effect to Harris' claim that Mays shot first. The Court finds that the jury had an adequate opportunity to assess Harris' evidence that Mays shot first in the context of the third question: Whether Harris' killing Mays was a reasonable response to provocation by Mays. Because the Court concludes that the jury did have the opportunity to consider the mitigating evidence in the context of the three questions propounded pursuant to art. 37.071, it recommends that Harris' first claim be denied.

2. Whether the jury was prevented from considering mitigating evidence not in the record

Harris' second claim is that the jury was precluded from considering as mitigating evidence that he suffered extensive emotional, psychological and sexual abuse as a child. Harris produced such evidence in support of his petition for *habeas corpus,* but he did not attempt to introduce it at trial. The Fifth Circuit has repeatedly held that claims that article 37.071 precludes the jury from adequately considering and weighing mitigating evidence may not be maintained if the mitigating evidence is not tendered at trial. *See e.g. West v. Johnson,* 92 F.3d 1385, 1405 (5th Cir. 1996), cert. *denied,*

520 U.S. 1242 (1997). Binding precedent compels the Court to recommend that this claim be denied.

3. Whether the trial court erred in refusing to give the defense's proffered jury instruction on voluntary manslaughter.

Harris' third claim is that the trial judge wrongfully refused his proffered jury instruction on voluntary manslaughter. The trial court instead gave the prosecution's proffered voluntary manslaughter instruction, which incorrectly placed upon the defendant the burden of proof of whether Harris killed Mays while under the immediate influence of sudden passion based upon adequate cause. *See Cobarrubio v. State*, 675 S.W.2d 749, 751 (Tex. Crim. App. 1983), *overruled in part on other grounds, Lawrence v. State*, 700 S.W.2d 208 (Tex. Crim. App. 1985).

Under Texas law, when a victim attempts to prevent the defendant from committing a felony, the victim's actions cannot constitute adequate cause to support a jury instruction on manslaughter. *Linecum v. State*, 736 S.W.2d 673, 679 (Tex. Crim. App. 1987), *cert. denied*, 486 U.S. 1061 (1988). The Texas Court of Criminal Appeals held that under *Linecum*, Harris was not entitled to a jury instruction on manslaughter at all. Accordingly, whether the instruction he did receive was incorrect is irrelevant. *Harris v. State*, 784 S.W.2d at 9-10.

Harris contends that the Texas Court of Criminal Appeals reached a different result on indistinguishable facts in *Havard v. State*, 800 S.W.2d 195 (Tex. Crim. App. 1990), and that the inconsistency between these decisions demonstrates that that court was biased against him. However, the cases are distinguishable. In *Havard*, the defendant was provoked by his ex-wife before engaging in felonious conduct, while in the present case, Harris' broke

into Mays' apartment and kidnapped Lockard without being provoked by either of them. The Court agrees' with the Texas Court of Criminal Appeals that the trial court was not required to give a manslaughter instruction in this case, and therefore, its failure to give a correct instruction did not deprive Harris of a fair trial.[1] The Court recommends this claim be denied.

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[1] Even if the Court determined that a voluntary manslaughter instruction was required, it would not grant relief on this claim. In *Mayabb v. Johnson,* 168 F.3d 863, 867-68 (5'" Cir.), *cert.. denied,* __ U.S __, 120 S.Ct 409 (1999), the Fifth Circuit held that in order to obtain *habeas corpus* relief because a trial court gave a voluntary manslaughter instruction which incorrectly placed the burden of proof on the defendant, there must be more than a mere reasonable possibility that the error contributed to the verdict; rather, the error must have had a substantial effect or influence in determining the verdict. Given the confidentiality of jury deliberations, it is difficult in all but the most extreme cases to determine with confidence whether an instruction which incorrectly allocates the burden of proof had a substantial effect or influence on a jury's final verdict.

In this case, however, the evidence suggests it did not. The third special issue under art. 37.071 is whether the defendant's actions in killing the decedent were an unreasonable response to the provocation, if any, of the decedent. This is similar to the elements of voluntary manslaughter, which are whether the defendant acted under the immediate influence of sudden passion based upon adequate cause. *See* Texas Penal Code Sec. 19.04. In the present case, the jury reached consistent results on the two issues. Because the jury was aware at the punishment phase that the burden of proof rested with the state when it decided the third question under art. 37.071, and it decided that question consistently with its decision on the voluntary manslaughter issue, it does not appear that the jury's being misinformed as to who had the burden of proof on the manslaughter issue substantially affected or influenced their verdict on that issue.

4. Whether the prosecutor's closing argument denied Harris a fair trial

Harris' fourth claim is that the prosecution's improper statement during its closing argument denied him a fair trial. The prosecutor stated: "Ladies and gentlemen, there's one verdict that's proper in this case. You've known it since yesterday, the verdict that [the] family and those police officers and the people of Jefferson County know is proper in this case-"Harris' counsel objected and the Court sustained the objection. Defense counsel then asked the court to instruct the jury to disregard the statement and the court replied: "So instructed." The prosecutor then finished his argument by stating: " It's the verdict we know you will return, because it's justice in this case... That verdict is capital murder."

Under state law, a jury argument which refers to the expectations or demands of the community for a particular result constitutes reversible error, even if the jury is instructed to disregard the remark. *See* Harris, 784 S.W.2d at 12. To obtain relief in a federal *habeas corpus* case, however, a petitioner must show either that the state prosecutor's misconduct was persistent or pronounced or that the evidence of guilt was so insubstantial that he would not have been convicted but for the improper remarks. *Jones v. Butler,* 864 F.2d 348, 356 (5th Cir. 1988), *cert. denied,* 490 U.S. 1075 (1989). In the present case, the passage quoted above does not establish persistent or pronounced misconduct. In addition, there was substantial evidence of Harris' guilt, including his own testimony, the testimony of Lockard and the testimony of the detectives. Because Harris' contentions establish neither of the alternative prongs

of the *Butler* test, the Court recommends that his fourth claim be denied.

5. Whether Harris' confession was involuntary

Harris' fifth claim is that his confession, was involuntary, having been procured through several unconstitutional actions by the police. Harris was arrested initially for driving while intoxicated. The police searched his vehicle and found a gun under the driver's seat. After determining that the gun was stolen, they informed Harris that he was also under arrest for burglary. The officers called for paramedics who treated Harris' wounds. Harris stated that he wanted to talk with Kitrell, the police chief, whom he knew and trusted. At the station, the officers learned about Mays' killing and realized that Harris' gunshot wounds and the description of his vehicle were consistent with what the police knew about that crime. Kitrell told Harris that he believed Harris was involved in Mays' death as well. When Harris expressed fear of being killed in prison, the police chief said in essence that he could not do much to help him, but that he would try to make the right people aware of his situation. Harris then waived his rights under Miranda and gave an oral and later a written confession to abducting Lockard and killing Mays. The police then took Harris before a magistrate judge for arraignment.

Harris makes four arguments why his confession should be suppressed. He contends first that it is "fruit of the poisonous tree" in that the search of his vehicle was unconstitutional. Unless a petitioner can establish that the State did not provide a full and fair opportunity to litigate a fourth amendment claim, however, such a claim is not cognizable in federal *habeas corpus*. *Stone v. Powell*, 428

U.S. 465, 494-95 (1975). Harris makes no such allegations about the State court suppression hearing in his case.

Harris next contends that his confession should be suppressed because the combination of his intoxication and his bullet wounds rendered him incapable of validly waiving his *Miranda* rights. Considering that his intoxication would decrease over time and that his statements were made several hours after his arrest, and considering that his statements were made after he had received medical treatment for his wounds, the Court sees no reason to disturb the State court's determination that he was capable of knowingly and voluntarily waiving those rights.

Harris contends third that Kitrell used Harris' trust in him, as well as the promise that he would help him avoid being killed in prison, as tools to coerce his confession. Kitrell admits that he tried to play on Harris' trust, and the record shows that he offered to talk with people in the prison system on Harris behalf. A confession is considered involuntary if it results from a promise by a police officer of a benefit that the officer had the power to grant or to withhold. *Hawkins v. Lynaugh,* 844 F.2d 1132, 1140 (5th Cir. 1988), *cert. denied,* 488 U.S. 900 (1988).

In *Hawkins,* the court held that a promise during questioning to try to help obtain psychiatric help or counseling for a suspect did not constitute a promise or a benefit that the officer had the power to grant or to withhold. *Hawkins* implies that a promise to request a benefit is not the same as a promise to provide a benefit. The statement by Kitrell in the present case that he would inform the people in the prison system of petitioner's situation was essentially a promise to request added protection. Kitrell's statement thus seems indistinguishable from the statement found unobjectionable in *Hawkins.* Further, the Fifth Circuit held

that attempts to gain psychological advantage over a suspect, such as using a sympathetic interrogator, or even using trickery, do not render a confession involuntary unless they exert psychological pressure strong enough to overbear the will of a mature, experienced man. *Id.* Upon reviewing the above facts, as well as the fact that Harris had an extensive criminal record and thus had had numerous dealings with the police, the Court does not find sufficient reason to overturn the State court finding that Harris' confession was voluntary.

Finally, Harris contends that his confession should be suppressed because he was not taken before a magistrate judge "without unnecessary delay" in violation of state law. The Fifth Circuit addressed a similar claim in *West v. Johnson,* 92 F.3d 1385 (5th Cir. 1996), *cert. denied,* 520 U.S. 1242 (1997) and found that violation of state statutory requirements was not enough to establish a federal *habeas corpus* claim; instead, the petitioner must show that the delay in taking him before a magistrate was unreasonable. In that case, the court held that a delay of 30 hours did not state a claim for relief, because delays of up to 48 hours are presumed reasonable. *Id.* at 1405. Because Harris' appearance before a magistrate occurred within 18 hours of his arrest, the Court finds that no federal constitutional violation occurred. Finding no merit in Harris' four arguments about the propriety of his confession, the Court recommends that his fifth claim be denied.

6. Whether the special punishment issues were unconstitutionally vague

Harris' sixth claim is that the three questions propounded to the jury at the sentencing phase of the trial are unconstitutionally vague because certain terms were not defined. The Fifth Circuit rejected this claim in *James v. Collins,* 987 F.2d 1116, 1119-20 (5th Cir.), *cert. denied,* 509

U.S. 947 (1993). Accordingly, the Court recommends that this claim be denied.

7. Whether trial and appellate counsel provided ineffective assistance

Harris' seventh claim is that his counsel provided ineffective assistance, both at trial and on appeal. In *Strickland v. Washington,* 466 U.S. 668, 686 (1984), the United States Supreme Court established a two-part test for determining ineffective assistance of counsel claims: Counsel's performance must fall below the standard of conduct expected of a reasonable attorney under the circumstances, and second, had counsel acted properly, there must be a reasonable probability that the result in the proceeding would have been different. Petitioner must establish both of these elements; if the Court determines that he cannot establish one of them, it is unnecessary to consider whether he can establish the other. The Court indulges a strong presumption that counsel's representation was effective. 466 U.S. at 688.

a. at trial

In the present case, the trial judge conducted a hearing by affidavit on Harris' claims and determined that counsel was not constitutionally ineffective. The factual predicate to this determination is presumed correct. *Pratt v. Cain*, 142 F.3d 226, 230 (5th Cir. 1998).

Harris argues that the State court factual findings are not entitled to the presumption of correctness because the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing, the material facts were not adequately developed at the State court hearing, he did not receive a full, fair and adequate hearing in the State court proceeding and he was denied due process of law in the

State court proceeding. His sole support for the above allegations is that the judges on the Texas Court of Criminal Appeals and the trial judge were not impartial and were in fact biased against him. As evidence of that bias, he points to the footnotes in *Harris v. State,* 784 S.W.2d 5 (Tex. Crim. App. 1989), *cert. denied,* 494 U.S. 1090 (1990) and *Ex parte Adams,* 768 S.W.2d 281 (Tex. Crim. App. 1989), both of which imply that Harris was guilty of a different murder with which he was never charged. He also points out that two of the trial judge's findings of fact in his state habeas corpus case were sarcastic in tone.

Harris' argument is flawed for two reasons. First, because the trial judge, not the Court of Appeals, conducts the fact-finding hearing, any alleged bias on the part of the Texas Court of Criminal Appeals is simply irrelevant. Second, that two of the trial judge's findings of fact and conclusions of law contained sarcastic remarks is, while unfortunate, insufficient in and of itself to sustain a charge of bias. *Compare Liteky v. United States,* 510 U.S. 540, 555 (1994) (judicial remarks during the course of a trial that are critical or disapproving of, or even hostile to, counsel, the parties, or their cases, ordinarily do not support a bias or partiality charge). To obtain relief by way of federal *habeas corpus,* therefore, Harris bears the burden of rebutting the presumptions of effectiveness and the presumption of correctness of the State court's factual findings by convincing evidence. See 28 U.S.C. §2254(d)(8).

Harris contends in his petition that there were fourteen instances in which his trial counsel was ineffective. He first contends counsel should have challenged the inventory search of his truck. A direct challenge to the search is foreclosed under *Stone v. Powell.* See claim 5 above. The merits of this claim still must be discussed in order to

determine whether, had counsel raised this issue, the result in the case would have been different.

Harris contends that the investigation which resulted in his confession was a product of his arrest for burglary, which occurred after a gun was found under the seat of his car, and that the "inventory search" justification for finding the gun is invalid under *South Dakota v. Opperman,* 428 U.S. 364 (1976). There are two problems with this argument. Assuming *arguendo* that Harris is correct about *Opperman,* regardless of the officer's stated rationale for the search, a police officer may conduct a contemporaneous search of the passenger compartment of a vehicle when he effects a custodial arrest of the driver. *New York v. Belton,* 453 U.S. 454, 460 (1981). Accordingly, the search of Harris' truck was justified by the "search incident to arrest" exception to the warrant requirement, even if it was not justified by the "inventory search" exception.

Moreover, even if the inventory search and the arrest for burglary were invalid, Harris was already under arrest for driving while intoxicated; there is no indication that he would not have been taken to jail and questioned further about his bullet wounds even if the police had not found the stolen gun. Because a challenge to the arrest would have failed for both of these reasons, it was not deficient performance for counsel to have forgone raising this claim, and, had counsel raised these claims at trial, there is not a reasonable probability that the result in the case would have been different. This sub-claim fails to meet either prong of the *Strickland* test.

Harris contends next that counsel's motions to suppress his confession contained no citations to legal authority. Counsel contended that it was standard practice to file boilerplate motions and to wait to discuss specifics until the

hearing on the motion. Assuming *arguendo* that trial counsel's performance was deficient, the Court nevertheless finds that a better motion would not have made a difference in the outcome of the case, because, as explained above, the confession was not unconstitutionally obtained. Accordingly, this sub-claim does not meet the second element of the *Strickland* test.

Harris next claims that his trial counsel's motion to suppress Lockard's initial identification of him was deficient in that it did not address the fact that her testimony was enhanced through hypnosis, and that it did not argue that Lockard's identification of him resulted from an impermissibly suggestive line-up. Because the Court has already proposed finding that Harris' confession was not obtained in violation of his constitutional rights, and because his confession precluded the need for an in-court identification, the Court proposes finding that there is not a reasonable probability that, had the motion contained the missing contentions, the result in Harris' trial would be different. This sub-claim fails to meet the second prong of the *Strickland* test.

Harris next contends that counsel should have investigated his history of drug and alcohol abuse, below-average intelligence, possible brain damage, intoxication at the time he committed the crime and effect of being wounded in order to demonstrate that he could not have formed the requisite intent to commit murder. Counsel testified in his affidavit that, as a matter of strategy, he opted to pursue only a defense of attempting to demonstrate that Harris' actions constituted voluntary manslaughter.

Hands contends that the first strategy would have had a better chance of success than the strategy that was actually employed. Perhaps he is correct, but that is not the test. If

counsel chooses a reasonable defense strategy after thoroughly researching the alternatives, his not pursuing those other alternatives does not constitute deficient performance for purposes of the *Strickland* test. *See Pratt*, 142 F.3d at 231. The trial court found that counsel did extensive research and investigation. Thus, the inquiry for purposes of federal *habeas corpus* review is not whether another strategy might have worked better, but rather whether the strategy employed was unreasonable.

As discussed above, the Texas Court of Criminal Appeals held that on the facts of the case, Harris was not entitled to a jury instruction on voluntary manslaughter, citing *Linecum* This would suggest that counsel's strategy was unreasonable; however, *Linecum* was decided after the trial in this case, and, indeed, the trial judge did give a voluntary manslaughter instruction to the jury in Harris' trial, albeit an incorrectly formulated one. Because Harris' counsel was successful in getting his defense to the jury, this Court cannot find that his counsel's strategy was unreasonable. Accordingly, this sub-claim does not meet the first prong of the *Strickland* test.

Harris next contends that counsel failed to follow up on the results of a polygraph examination given to Lockard. Counsel disputed this contention in his affidavit. Because the results of the polygraph examination were not admissible-for any purpose, Harris cannot demonstrate that, had counsel conducted further investigation, there is a reasonable probability that the result of his trial would have been different. This sub-claim does not meet the second prong of the *Strickland* test.

Harris contends that counsel should have objected to Lockard's testimony about his state of mind; specifically, that he did not seem to be in a hurry when he got into his

truck. Harris has not demonstrated that there is a reasonable probability that such an objection would have been sustained. Further, he has not demonstrated that, even had it been sustained, there was a reasonable probability that the result in his trial would have been different. This sub-claim does not meet the second prong of the *Strickland* test.

Harris next contends that counsel should have objected to the prosecution's closing argument as going outside of the record. However, counsel objected to the argument on other grounds, the objection was sustained, and the jury was instructed to disregard the argument. See claim 4 above. Harris has not demonstrated that, had counsel objected on a different basis, there is a reasonable probability that the result of his trial would have been different. This sub-claim does not meet the second prong of the *Strickland* test.

Harris contends that counsel used the wrong basis to challenge venirepersons LaFleur and Hernandez. Neither of them served on the jury, and Harris has not established that there was a reasonable probability that, had counsel offered proper challenges, the result in his case would have been different. This sub-claim does not meet the second prong of *Strickland* test.

Harris next contends that his trial counsel should have moved to suppress two statements he made during interrogation: that he had fired the last shot at Mays in order to "finish him off" and that he entered Mays' apartment because he "was out looking for a piece." Harris contends that these statements were inflammatory, prejudicial and inadmissable under state law.

Assuming *arguendo* that counsel's failure to object to the admissibility of these statements was unreasonable under the circumstances, *Strickland* requires the Court to determine whether there is a reasonable probability that, had counsel

objected and had the statements been excluded, the result in the trial would have been different. As to Harris' first statement, the testimony of the pathologist that the fatal wound to Mays' head was fired from a distance of one to two feet strongly supports an inference that the shot was fired to "finish him off." Similarly, Lockard's and Harris' testimony were consistent that he abducted her from Mays' apartment at gunpoint. Their testimony strongly support an inference that he "was out looking for a piece" when he entered the apartment.[2] Because this evidence strongly supported the same inferences as to what Harris was thinking as what he described in his oral statement, there is not a reasonable probability that excluding those oral statements would have caused the jury to reach a different result. This claim does not meet the second prong of *Strickland*

Harris next contends that his trial counsel was ineffective for failing to hire an expert witness, and in failing to adequately prepare to cross-examine the state's expert witnesses, on the issue of how far away Harris was from Mays when he fired the final shot. Counsel testified that before the trial, he had interviewed one of the two pathologists that were eventually called by the State, and, based on that interview, believed that the testimony of that witness would cast some doubt on the testimony of the other pathologist, so counsel did not think it necessary to obtain a defense witness. Counsel testified that he was surprised at

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[2] Harris testified that he entered the apartment in order to commit a robbery, but abducted Lockard in order to escape safely from the apartment. Considering that locking the young woman in the bathroom with her boyfriend would have been a much safer way to make his escape than by abducting her, Harris' actions appear more likely a product of the state of mind he described in his oral statements to the police than of the state of mind he expressed in his trial testimony.

trial when the witness testified differently from what he had told counsel during the interview. Because counsel did not depose the witness, he was not able to impeach his trial testimony. When surprised at trial, counsel did not ask for a continuance to obtain an expert, believing that the Judge would not grant the request.

Assuming *arguendo* that these decisions constituted deficient performance, the second prong of *Strickland* test requires the Court to analyze whether, had trial counsel requested a recess in order to obtain an expert witness, the result in the case would have been different. The Court has considered three scenarios. In the first scenario, the Court considered the likelihood that the request would be denied by the trial court and the likelihood that an appeal would not have been successful because the denial would have been reviewed under an abuse of discretion standard. In the second scenario, the Court assumed that the trial court granted the request for a continuance and then considered the likelihood that counsel might not have been able to obtain an expert witness who would testify that the shot was fired from more than two feet away, either because counsel could not locate a witness within the necessarily brief recess which the trial court might have granted, or because in fact the shot was fired from within two feet or less of Mays' head. In the third scenario, the Court assumed that the trial court granted the request and the defense located an expert who gave beneficial testimony on the issue. The Court then considered the possibility that the jury might not have believed the expert, or, in the alternative, the likelihood that even though they believed him, the fact that the final shot was fired from more than two feet away is not a defense to guilt and would be of debatable value as mitigating evidence. After weighing these factors and considering all three scenarios, the Court proposes finding that there is not a reasonable .probability that, had trial counsel requested a continuance in

order to obtain an expert witness on this issue, the result in the case would have been different. This sub-claim does not meet the second prong of the *Strickland* test.

Harris next contended that trial counsel provided confidential information about him to the producers of a movie about another murder. He points out that the theme of that movie was that he was the actual killer and that an innocent man was sentenced to death for that murder. He contends that the release of the movie caused unfavorable publicity which caused the Texas Court of Appeals to be biased against him. He contends that, although he executed a release, counsel produced information beyond the scope of that release, and that trial counsel should have dissuaded him from cooperating in any fashion with the film's producer.

Assuming *arguendo* that counsel's actions were unreasonable, Harris' claim fails because he cannot show that either the movie or the publicity resulting from it caused the alleged bias in the Texas Court of Criminal Appeals. To support his claim of bias, Harris refers to footnotes in two published opinions which discuss his role in the case about which the movie was made. These footnotes, however, discussed facts which were contained in the records of the cases themselves and which were relevant to the issues in those cases; there is no indication that the judges of the Court of Criminal Appeals were influenced by the movie or by the publicity it caused.

Moreover, even if the judges were influenced by the movie, Harris does not contend that the background information supplied by counsel was responsible for the judges' bias. Accordingly, there is not a reasonable probability that, had Harris' trial counsel not given information about his background to the movie producers,

the result on his appeal would have been different. This sub-claim fails to meet the second prong of *Strickland* test.

Harris next contends that trial counsel should have objected, at the punishment phase of his trial, to the introduction of "pen packets" that had not been properly authenticated as required by *Dingier v. State*, 768 S.W.2d 305 (Tex. Crim. App. 1989). The Court finds *Dingier* distinguishable, as it dealt with the admission of prior convictions under the Texas habitual offender statute. The standards for admissibility of evidence of crimes in the punishment phase of a capital case - where the result is not mandated by the admission of evidence of prior convictions - need not be so rigid.[3] Because *Dingier* does not establish the standard of admissibility for evidence of prior convictions in the punishment phase of a capital trial, counsel's failure to object to the evidence presented in Harris' case is not deficient performance. This sub-claim fails to meet the first prong of the *Strickland* test.

Harris next contends that counsel failed to object to the prosecution's introduction of unadjudicated offenses he allegedly committed. Because such evidence is admissible, see claim 8 below, counsel's failure to object did not constitute deficient performance; furthermore, because the objection, if made, would have been denied, there is not a reasonable probability that the result in the case would have been different. This sub-claim fails to meet either prong of the *Strickland* test.

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[3] For example, as explained in claim 8, evidence of both unadjudicated offenses and even of crimes for which the defendant has been acquitted are admissible in the sentencing phase of capital cases. Neither could be used under the State habitual offender statute.

Harris next contends that counsel should have called a witness who would have testified that he and Harris were drinking heavily until 6:00 p.m. the evening of the crime. He contends that this testimony would have better established Harris' intoxication than the testimony of the alcohol counselor which counsel employed. Because the crime occurred more than six hours after the witness last saw Harris, the Court finds that counsel's decision not to call this witness was not unreasonable. This sub-claim fails to meet the first prong of the *Strickland* test. Harris next contends that trial counsel failed to properly investigate, and failed to present, all of the mitigating evidence available at the punishment phase of his trial. Harris filed an affidavit in support of this claim with his State *habeas corpus* application. In that affidavit, he stated:

> Counsel never indicated or discussed with me the importance of presenting mitigating evidence at the penalty phase and did not explain to me the general types of evidence that could be submitted or, beyond a brief conversation about testimony from my family, any specific evidence that could be submitted in my case.
>
> * * * * * *
>
> If my trial counsel had explained to me the importance of mitigating evidence, I certainly would have instructed them to interview my family members and to elicit testimony from them. I also would have explained to them the facts concerning my background that are set forth in detail in the habeas petition filed on my behalf.

In his state petition, Harris claimed that mitigating evidence was available from both family and non-family sources about his suffering several traumatic childhood

experiences. He also claimed that evidence of his good character traits was available and that both of these types of evidence should have been introduced, but were not.

The trial judge conducted a "paper" hearing on Harris' claim, *see Perillo v. Johnson*, 79 F.3d 441, 446 (5th Cir. 1996), allowing counsel to respond to the allegations in the petition by affidavit. In response to the allegations of failing to present mitigating evidence, lead trial counsel stated in his affidavit:

> These allegations deal with the failure to present mitigating evidence. I will state that I did extensive investigation into David's background and history. I obtained through the family boxes of information and records of David's background and history. I did interview the family members. The decision as to the mitigation evidence to be presented was made by the client, contrary to counsel's advise(sic).

Co-counsel's response was similar: .

> The mitigating evidence which was presented on behalf of David Ray Harris was presented with the consent of the defendant. My recollection is that persons whom we would like to call on behalf of the defendant, and many facts which we would have liked to have delved into were ruled out by the defendant . . .

The State Court denied the petition, finding that:

> Trial counsel did extensive research and investigation to discover favorable mitigating evidence. All matters were fully and completely conveyed to and discussed with Petitioner. The decision as to what evidence to produce or not

> present at trial was made intentionally, knowingly and voluntarily by Petitioner.

As discussed above, under 28 U.S.C. §2254 (e)(1), this finding is entitled to a presumption of correctness. Normally, the evidence upon which an applicant would challenge a State court fact finding must have been presented to the State court. Under 28 U.S.C. §2254 (e)(2)(A)(ii), however, the federal court may conduct an evidentiary hearing in order to develop evidence if the claim relies on a factual predicate that could not have been previously discovered through the exercise of due diligence. This Court conducted such a hearing. At that hearing, Harris' trial counsel's testimony contradicted the testimony in his affidavit, and also contradicted what the trial judge found as fact:

> Q. David never instructed you not to investigate potential evidence that could be available for his punishment phase from sources other than his family, did he?
>
> A. In essence, yes.
>
> Q. What do you mean, in essence? He either did or he didn't.
>
> A. David didn't want to talk about the punishment phase. His position all along was, he wanted to win at guilt-innocence. That if he was convicted of capital murder, he'd rather get the death penalty than a life sentence. He didn't want to spend the rest of his life in prison. It was an issue we argued over. It wasn't a realistic issue and it was an issue I felt like at some point in the future, he would regret.

Q. And is it your position that once David said, "I don't want to focus on the punishment phase. I want to focus on the guilt-innocence phase," that you, as an effective competent advocate on his behalf, just throw up your hands and walk away from dealing with the punishment phase? .

A. I wouldn't think that at all. I think it limits how you try your case and it limits where you devote your attention. But obviously, when it came to cross-examining punishment witnesses and making oral arguments, I felt like we gave it everything we had.

Q. Did you ever tell David that failing to call family members, failing to call any other witnesses at the punishment phase could, in fact, make the difference between life and death for him?

A. Would probably, in fact.

Q. And he said, "I don't want to do it," so you just marched on down the road?

A. I felt like the client certainly had a voice in how he wanted his case tried. I talked to him enough times that I felt comfortable he understood what he was deciding.

* * * * *

Q. Mr Powell, you just testified a few minutes ago that David told you he did not want his family involved in the punishment phase and he did not want further investigation done at the punishment stage because, if he was convicted, he would prefer death to life, correct?

A. Yes.

Q. Then explain to us please, why you put on Nancy Petkovsek and Evelyn Powell and why you cross-examined any of the state's witnesses at the punishment phase? Was that not in direct violation of your client's instructions?

A. Yes.

Q. So, when there were matters that you thought were sufficiently important with respect to the punishment phase, you felt free to violate your client's instructions?

A. I felt like there were things I could do without any help from David and I tried to do those. Yes, I was circumventing what he told us.

Counsel's testimony at the evidentiary hearing contradicts the State court's findings in two important respects. First, all matters were not completely and fully conveyed to Harris. Because counsel believed that Harris in essence did not want mitigating evidence presented, he did not discuss with Harris that he was investigating mitigating evidence through non-family members.

Second, the decision of what evidence to produce or not to produce at trial was not made intentionally, knowingly and voluntarily by petitioner, because counsel directly violated and circumvented what he believed to be Harris' instructions not to put on mitigating evidence, by putting on the testimony of his probation officer and his alcohol counselor.

Because trial counsel's testimony at the federal court evidentiary hearing contradicted his prior affidavit in two key respects, and because the State Court's findings were based upon counsel's affidavit, the Court proposes finding Harris has met his burden under 28 U.S.C. §2254 (e)(1) of

rebutting by convincing evidence the presumption of correctness of the state trial court's findings on his ineffective assistance of counsel claim. The Court thus reviews the claim *de novo.*

Having reviewed all of the evidence, including Harris' affidavit, the affidavits of counsel given for the state court hearing and the deposition testimony of counsel at the evidentiary hearing, the Court proposes the following findings:

While preparing for trial, counsel began to investigate possible mitigating evidence through interviewing and obtaining material from family members. When they broached the subject with Harris, he told them that he did not want his family involved in his trial at all, and that he wanted them to concentrate on the guilt-innocence phase in their preparations. Harris also said, on more than one occasion, that he preferred death to life imprisonment.

Counsel believed that Harris would regret his decision, and, in case he changed his mind, they decided to continue to prepare to put on a case in mitigation. They asked Harris to reconsider his instructions not to involve his family, but he refused. As a result of Harris' refusal, counsel completely abandoned investigating Harris' childhood. They decided not to any background information at the punishment phase of Harris' trial if he were convicted, even though they thought it would probably mean the difference between life and death. They limited their investigation and preparation to developing evidence about Harris' alchoholism and drug abuse, his recent improvement in dealing with these problems, and his good personal qualities. Counsel relied on two-non-family witnesses: his parole officer was willing to testify as to his good behavior and good qualities, and his alcohol counselor was willing to testify that he was not the

sort of person who deserved the death penalty because his criminal behavior occurred only when he was intoxicated, and he was making progress towards controlling his alcoholism. Counsel ruled out investigating or introducing psychiatric testimony because they believed that juries were not impressed by "hired gun" experts. Counsel prepared to cross-examine the state's witnesses, including the state psychiatrist who would testify as to Harris' future dangerousness, and prepared closing arguments.

As counsel expected, Harris did have a change of heart after being convicted, and he agreed to allow counsel to put on their case in mitigation. Counsel introduced the evidence they had developed. Counsel did not, however, discuss with Harris the tactical decision they made not to further investigate his background or prepare a case for mitigation based upon his background during the time Harris was still convinced that death was preferable to life imprisonment.

The initial inquiry for the Court is whether, under the circumstances, counsel's tactical decisions were reasonable. By the time Harris first instructed counsel not to call family members as witnesses, counsel had developed substantial evidence from Harris' family members about his childhood difficulties and emotional and physical traumas. Counsel believed that evidence of Harris' background and experiences "would probably" be dispositive in the mitigation phase, so their decision to drop this line of defense entirely, rather than to attempt to introduce as much of this evidence as they could through the testimony of non-family members, seems to have been based on a mistaken inference that Defendant did not want them to investigate and introduce any evidence at all about his

background, rather than simply not to involve his family in his trial.[4]

A decision to forego what counsel knows to be a critical defense, based upon mistaken assumptions, is deficient performance. Cf. *Loyd v. Whitley,* 977 F.2d 149, 158-59 (5th Cir. 1992), *cert. denied,* 508 U.S. 911 (1993) (decision not to obtain psychological analysis of defendant's sanity at time of crime, based on mistaken belief that funds were not available, is deficient performance.) While counsel is not expected to disobey Harris' direct instructions not to involve his family members in the trial, *see Amos v. Scott,* discussed in footnote 4 above, a client's refusal to allow witnesses to testify to an issue does not negate a counsel's duty to investigate that issue, it simply narrows the scope of the investigation. *See Gray v.* Lucas, 677 F.2d 1086, 1093 (5th Cir. 1982), *cert. denied,* 461 U.S. 910 (1983). In the present case, counsel should have narrowed the scope of their investigation into Harris' background to non-family member witnesses rather than abandoning the issue entirely. Indeed, regardless of Harris' instructions, evidence of Harris' background would actually be more credible if introduced through non-family members. *See Mann v. Scott,* 41 F.3d 968, 983 (5th Cir. 1994), *cert. denied,* 514 U.S. 1117 (1995). Harris' instructions not to involve his family in the trial did not render investigating and introducing such evidence

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[4] This case is factually similar to Amos *v. Scott,* 61 F.3d 333, 348 (5th Cir.), *cert.. denied,* 516 U.S. 1005 (1995), but the court in that case based its contrary decision on the following facts not present in this case: In Amos, the defendant not only told his attorneys that he didn't want his family involved in the trial, he confirmed in writing, and stated in open court to the trial judge, that he did not want any witnesses at all called at the punishment phase, and counsel put on no testimony in the punishment phase of the case.

impracticable. *Compare Ward v. Whitley*, 21 F.3d 1355, 1362-63 (5th Cir. 1994), *cert. denied* 513 U.S. 1192 (1995) (defendant cannot blame attorneys for failing to introduce toxicological evidence when he refused to cooperate with the toxicologist) The Court proposes finding that counsel's decision constituted deficient performance.[5]

Having proposed finding that this claim meets the first prong of the Strickland test, the Court analyses whether it meets the second prong of the *Strickland* test: whether there is a reasonable probability that, had counsel presented the mitigating evidence, the result in the proceeding would have been different. Harris has produced several affidavits of non-family members, and several records which establish that Harris suffered intense and consistent emotional abuse at the hands of his father, the trauma of losing his younger brother from drowning at age four, the trauma of being blamed by his father for his brother's death, below average intelligence, being ostracized at school because of rumors of a homosexual episode, being homosexually gang raped at age 13, three organic brain injuries which required

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[5] The Court's proposed facts are based on its review of the entire record. Even if the Court simply credited trial counsel's testimony in the federal *habeas* corpus evidentiary hearing, however, it would reach the same result. The Court recognizes that as a general rule, counsel cannot be found ineffective for failing to put on mitigating evidence, if the client expressly instructs them not to. See Amos *v. Scott, supra* fn. 4. As illustrated by the present case, however, if the client's instructions are ambiguous, if counsel believes that the evidence would be the difference between life and death, if counsel believes the client will have a change of heart, and if counsel deliberately disobeys and circumvents what he believes to be are his client's instructions not to offer mitigating evidence, counsel cannot insulate himself from a claim that he tried a sub-par case in mitigation by relying on the general rule.

hospitalization, and substance and alcohol abuse from an early age. They also produced records which established that although Harris' overall prison record was far from exemplary, it at least showed steady improvement.

To determine whether mitigating evidence might have made a difference in the jury's verdict at the punishment phase, the Fifth Circuit has compared the strength of the mitigating evidence with the strength of aggravating evidence. *See e.g. Duhamel v. Collins,* 955 F.2d 962, 965-66 (5th Cir. 1992). Because *Duhamel* is also a kidnaping/murder case which involved the failure to present mitigating evidence of defendant's background, it is sufficiently similar to the present case to serve as a model for comparison. In *Duhamel,* the defendant abducted, beat, raped and choked to death a nine-year old girl. He had a significant criminal record, and had assaulted a seven year-old boy in a somewhat similar manner, although there is no evidence that he seriously injured the boy.

Duhamel claimed that his counsel should have introduced mitigating evidence at the punishment phase that he suffered from moderate mental retardation, alcoholism and vagrancy, and that his father had abused his mother. The district court granted the petition, finding that the jury might have answered one of the special issues differently had it considered this evidence. The Fifth Circuit reversed, finding that the district court applied the wrong legal standard. Rather than remanding, the Court of Appeals performed the analysis *de novo* under the correct legal standard, and determined that the mitigating evidence was so outweighed by the strong evidence of guilt, the young age of the victim, the brutality of the murder, the defendant's apparent lack of remorse and his previous criminal record that, even had the mitigating evidence been presented, there was not a

reasonable probability that the result in the sentencing phase would have been different.

Comparing *Duhamel* with the present case, on the elements cited by the Court of Appeals, is instructive. As to the strength of the evidence of guilt and the defendants' previous records, the differences between Duhamel's case and Harris' case are insignificant. As to the brutality of the crime, both cases involved the abduction of a female. However, Harris abandoned the abduction after killing Mays, and did not kill Lockard despite the possibility that she could be a witness against him. As to the killing of Mays itself, the evidence is that while Harris was prepared to kill Mays if Mays did not allow him to abduct Lockard, he did not in fact shoot Mays until Mays had shot him first. Although not a legal defense, see claim 3 above, this distinction renders the killing itself less brutal than the unprovoked rape and murder in *Duhamel.* As to the age of the victim, both Harris' intended sexual assault victim, Lockard, and his murder victim, Mays, were adults, whereas Duhamel's victim was a nine-year old child. As to the issue of remorse, Harris did express remorse for killing his victim, while Duhamel did not. In summary, Harris' and Duhamel's cases were equal as to two of the five factors considered by the Fifth Circuit, but the case against Harris was weaker than the case against Duhamel as to three of the five factors.

Comparing the elements considered in mitigation, Duhamel's and Harris' IQ scores were similar, as was their alcoholism. As to childhood trauma, Duhamel sought to offer only evidence that his father abused his mother, and that he was a vagrant. Harris seeks to offer evidence that his father severely abused him emotionally throughout his childhood and adolescence, that he lost his brother at age four and was blamed by his father for his death, that he was ostracized from his classmates because of rumors of

homosexual conduct, that he was homosexually gang raped at age thirteen, that he was a substance and alcohol abuser from a young age, and that he suffered three head injuries serious enough to require hospitalization. Harris also sought to offer evidence that his prison record had substantially improved over time. In summary, as to mitigation, Harris' and Duhamel's cases are similar as to the elements of intelligence and alcoholism, but Harris' case is far stronger on the element of childhood trauma, both emotional and physical. Harris also sought to offer evidence on the issue of improving his conduct in prison, which Duhamel did not.

Comparing these cases shows that the evidence for aggravation in Harris' case was considerably weaker than the evidence in *Duhamel* and the evidence for mitigation considerably stronger, particularly considering that Harris also presented testimony from his parole officer and his alcohol counselor that intoxication was a factor in his criminal activity, that he was attempting to overcome his alcoholism, and that the death penalty was not appropriate in his case. The Fifth Circuit found that no prejudice existed based on the facts of *Duhamel,* but considering that that case was close enough that the district judge initially found prejudice,[6] and considering that this case is significantly more compelling than *Duhamel* on both aggravation and mitigation, the Court is not confident that at least one juror's decision that Harris receive death instead of life imprisonment would not have been different had this evidence been presented. *See Loyd v. Smith,* 899 F.2d 1416, 1426 (5th Cir. 1990).

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[6] The Court finds this relevant because the standard for prejudice that the district court relied upon, while incorrect, was similar to the correct legal standard. The Court used this same analysis in deciding Harris' voluntary manslaughter instruction claim. See footnote 1, above.

A recent United States Supreme Court case also supports this result. In *Williams v. Taylor,* 529 U.S. 362 (2000), the Court found a reasonable probability that the jury would have reached a different result on evidence of aggravation and mitigation arguably less favorable to the petitioner than the evidence in this case. Williams robbed and killed a man in November of 1985. In April of 1986, while in jail on an unrelated offense, Williams confessed to that crime, and to assaulting a woman who ended up in a vegetative state. In terms of damage done, the brutality of Williams' crimes was greater than the brutality of Harris' crimes. Both Williams and Harris confessed. Both expressed remorse, and the victims in both cases were adults. At the sentencing hearing, the prosecution introduced evidence of Williams' extensive criminal background, which included two auto thefts, armed robbery and burglary convictions and another violent assault committed on an elderly person after the two incidents to which Williams confessed. Harris' criminal background was similar, although Williams' background included more violence. In summary, the aggravating evidence in *Williams* was equal to the aggravating evidence in the present case on three of the five factors considered by the Fifth Circuit, and greater on the other two.

Regarding mitigating evidence, the evidence Williams' attorneys failed to produce was similar to the evidence in Harris' case. Williams' attorneys did not produce evidence of repeated physical abuse by his father and abuse in a foster home after his parents were imprisoned for criminal neglect. As in this case, Williams' attorneys did not produce evidence of his low I.Q. and education, nor of his good conduct in prison. Like Harris' prison record, Williams' prison record was mixed. Thus, except for the parental abuse being somewhat more acute in Williams' case, the mitigating evidence was quite similar. After weighing the aggravating

and mitigating factors, the Supreme Court reversed the Virginia Supreme Court's denial of Williams' *habeas* corpus petition, finding that counsel's failure to introduce this mitigating evidence "prejudiced Williams within the meaning of *Strickland*." 120 S.Ct. at 1515. The present cases's difference from *Duhamel* and its similarity to *Williams* leads the Court to propose finding that a reasonable probability exists that, had counsel in the present case presented evidence of Harris' background, the result in the punishment phase of this case would have been different. This sub-claim meets both prongs of the *Strickland* test.

b. on appeal

Harris contends that there were fourteen instances in which his appellate counsel's assistance was ineffective. The elements of an ineffectiveness claim are the same for appellate counsel as for trial counsel. *United States v. Williamson*, 183 F.3d 458, 462 (5th Cir. 1999). Accordingly, Harris' contentions about appellate counsel will also be analyzed under the *Strickland* standards.

Harris first claims that his counsel on appeal botched the presentation of the issue that the totality of the State's argument at the punishment phase denied Harris due process and a fair trial. The Texas Court of Criminal Appeals' opinion confirms that this issue was not properly presented. *See Harris*, 784 S.W.2d at 14-15 n.10. However, Harris never explains why the State's argument denied him a fair trial. Accordingly, he has not established a reasonable probability that, had appellate counsel properly presented the issue, the result in his appeal would have been different. This sub-claim does not meet the second prong of the *Strickland* test.

Harris next contends that counsel on appeal should have raised the trial court's denial of his challenge for cause of

venireperson Sowders on the basis of her friendship with one of the prosecutors. Appellate counsel testified in his affidavit that he believed that that issue did not have a likelihood of success, and so he raised instead the issue that the trial court should have granted the other challenge for cause made against her, that she misunderstood the defense's burden of proof. Because Harris has not demonstrated that had counsel raised this issue there is a reasonable probability that the result in his trial would have been different, this sub-claim fails to meet the second prong of the *Strickland* test.

Harris next claims that appellate counsel based his claim that the trial court erred in denying challenges for cause to venirepersons Hernandez and Bloodsworth on different reasons than those argued at trial, and that as a result, the court refused to consider this claim. The Court assumes *arguendo* that this constitutes deficient performance. However, Harris has not demonstrated a reasonable probability that had appellate counsel made the same arguments as those raised by trial counsel, the result on his appeal would have been different. This sub-claim does not meet the second prong of the *Strickland* test.

Harris next claims that appellate counsel should have claimed that the trial court erred in admitting evidence that he stole the gun with which he shot Mays. Harris claims that the evidence was immaterial and, in the alternative, that even if it was material its materiality was substantially outweighed by its prejudicial impact. Appellate counsel testified in his affidavit that he did not think that the issue had been preserved for appeal, and, even if it had, he did not believe that, had it been raised, it would have been successful. Because Harris has failed to establish that there is a reasonable probability that the issue, if raised, would have resulted in a different result, this sub-claim fails to meet the second prong of the *Strickland* test.

Harris next contends that counsel on appeal should have raised the trial court's denial of his motion to suppress his statements. Appellate counsel testified by affidavit that he did not believe that the issue would have been successful had he raised it. Because the Court has already determined that the issue would not have prevailed, see claim 5 above, Harris cannot establish that is was unreasonable for appellate counsel not to raise the claim; nor can he establish a reasonable probability that, had counsel raised the issue, the decision of the Texas Court of Criminal Appeals would have been different. This sub-claim meets neither prong of the *Strickland* test.

Harris next contends that appellate counsel should have raised the trial court's refusal to suppress evidence of Lockard's identification of him. Appellate counsel testified in his affidavit that he did not believe that the issue would have prevailed: Because the Court has already determined that this issue would not have prevailed, see footnote 2 above, Harris cannot establish that is was unreasonable for appellate counsel not to raise the claim, nor can he establish that there is a reasonable probability that, had counsel raised the issue, the decision in his appeal would have been different. This sub-claim meets neither prong of the *Strickland* test.

Harris next contends that counsel on appeal should have raised the trial court's admission of State's Exhibit No. 1, a photograph of Mays taken before he was killed. Appellate counsel testified by affidavit that he did not believe that this issue would have prevailed had he raised it. Because Harris does not demonstrate that there is a reasonable probability that, had counsel raised the issue, the Court of Criminal Appeals would have reached a different decision, this sub-claim fails to meet the second prong of the *Strickland* test.

Harris next contends that counsel on appeal should have raised the trial court's admitting a videotape of the crime scene. Appellate counsel testified that he did not believe that the trial court erred in admitting the videotape, so he believed the claim was unlikely to prevail on appeal. Harris does not demonstrate that, had counsel raised the issue, the Texas Court of Criminal Appeals would have reached a different decision, so this sub-claim fails to meet the second prong of the *Strickland* test.

Harris next contends that counsel on appeal should have raised the trial court's admitting hearsay testimony concerning an alleged fifth bullet casing. Appellate counsel testified in his affidavit that he believed that the admission of this testimony would have been considered harmless error, so he chose to limit the issues on appeal to those that he felt had a better chance of resulting in reversal. Because Harris does not demonstrate that there is a reasonable probability that had counsel raised the issue, the Texas Court of Criminal Appeals would have reached a different decision, this sub-claim fails to meet the second prong of the *Strickland* test.

Harris next contends that counsel on appeal should have raised as an issue the trial court's admission of testimony that Lockard shuddered when she heard Harris speak during the lineup. Appellate counsel testified in his affidavit that he thought that this claim was not viable. Because Harris does not demonstrate that reasonable counsel would have thought differently, this sub-claim fails to meet the first prong of the *Strickland* test.

Harris next contends that counsel on appeal should have raised the trial court's admission of Lockard's testimony concerning Harris' lack of remorse and his difficulty, if any, in firing the gun. Appellate counsel testified in his affidavit

that he believed that this testimony, if erroneously admitted, constituted harmless error in light of the other evidence against Harris, so he limited his appellate issues to those having a better chance of resulting in a reversal. Because Harris does not demonstrate that there is a reasonable probability that had counsel raised the issue, the Texas Court of Criminal Appeals would have reached a different decision, this sub-claim fails to meet the second prong of the *Strickland* test.

Harris next contends that counsel on appeal should have raised the trial court's admission of hypothetical testimony from Dr. Espinola concerning the relative position of Mays when he was hit with various bullets. Appellate counsel testified in his affidavit that in his opinion the trial court's decision to admit this testimony was not error. Because Harris does not demonstrate that reasonable counsel would have concluded that the trial court erred, this sub-claim fails to meet the first prong of the *Strickland* test.

Harris next contends that counsel on appeal should have appealed the trial court's allowing the State to call Harris as a rebuttal witness immediately following the conclusion of its cross-examination. Appellate counsel testified in his affidavit that he believed that the trial court did not abuse its discretion in allowing this procedure. Harris did not establish why a reasonable attorney would have believed otherwise, so this claim fails to meet the first prong of the *Strickland* test.

Harris next contends that counsel on appeal should have raised the trial court's admitting Dr. Gripon's testimony about Harris' future dangerousness. Because the Court holds that the admission of this testimony was not error, see claim 8 below, counsel's failure to raise the issue does not constitute deficient performance, nor is there a reasonable

probability that had counsel raised the issue, the Texas Court of Criminal Appeals would have reached a different decision. This sub-claim does not meet either prong of the *Strickland* test.

Harris' final contention is that counsel on appeal should have raised the trial court's exclusion of a dictionary definition of the term "deliberate." Because the Supreme Court had held that the term was not vague as used in the punishment questions, see claim 6 above, there is not a reasonable probability that, had counsel raised the issue, the Texas Court of Criminal Appeals would have reached a different decision. This sub-claim does not meet the second prong of the *Strickland* test.

Because Harris' claim that his counsel failed to reasonably investigate and introduce mitigating evidence at the punishment phase of his trial meets both prongs of the *Strickland* test, the Court recommends that this sub-claim be granted. Because none of Harris' other contentions about his trial counsel's or his appellate counsel's conduct meet both prongs of the *Strickland* test, the Court recommends that the remaining sub-claims in his seventh claim be denied.

8. Whether inadmissible evidence was introduced in the punishment phase of Harris' trial.

Harris' eighth and final claim is that he did not receive a fair trial at the punishment phase. He contends that the prosecution introduced evidence of an extraneous crime for which he had been acquitted, extraneous unadjudicated crimes and testimony as to his future dangerousness by a psychiatrist who had never examined him.

Each of Harris' contentions is meritless. Regarding his first contention, the Fifth Circuit has held that evidence of an extraneous offense for which the defendant has been

acquitted is admissible in the punishment phase of a capital case. *See e.g. Vega v. Johnson,* 149 F.3d 354, 359 (5thCir. 1998), *cert. denied,* 525 U.S. 1119 (1999). Regarding his second contention, the Fifth Circuit has held that evidence of unadjudicated extraneous offenses is admissible. *See e.g. Milton v. Procunier,* 744 F.2d 1091, 1097 (5thCir. 1984), *cert.. denied* 471 U.S. 1030 (1985). Harris points out that *Milton* requires that such evidence must meet "properly applied standards of relevance and sufficiency of proof' and asserts that the evidence in his case did not meet those standards. To the extent that his contention is based on the failure of the prosecution to produce certified pen packets, the Court has already rejected that claim in the context of his ineffective assistance of counsel claim. See claim 7 above. To the extent this contention is based on some other grounds, Harris does not provide any explanation or support. Regarding his third contention, the United States Supreme Court had upheld the admissibility of psychiatric testimony on the issue of future dangerousness in the punishment phase of a capital case through the use of a hypothetical question, despite the psychiatrist's failure to personally interview the defendant. *See e.g. Barefoot v. Estelle,* 463 U.S. 880, 903 (1983).

RECOMMENDED DISPOSITION

The Court proposes finding that Harris received ineffective assistance of counsel at the punishment phase of his trial. Accordingly, it recommends that his Petition be granted as to that claim, and a writ of *habeas* corpus issue to the Respondent, directing him to release the Petitioner unless the State of Texas, within a reasonable time, either resentences Petitioner to life imprisonment or conducts a new sentencing hearing. The Court recommends that all of Petitioner's other claims and sub-claims be denied. Within ten days after receiving the Magistrate Judge's Report and

Recommendation, any party may serve and file written objections pursuant to 28 U.S.C. § 636(b)(1)(c). Failure to file written objections within that time period bars an aggrieved party from *de novo* review by the District Court of the Magistrate Judge's Proposed Findings and Recommended Disposition and from appellate review by the Court of Appeals of any factual findings and legal conclusions contained in that recommendation which are accepted or adopted by the district courts, except on grounds of plain error. *Douglass v. United States Automobile Association,* 79 F.3d 1415, 1428 (5thCir. 1996).

SIGNED this 25th day of June, 2000.

WENDELL C. RADFORD
UNITED STATES
MAGISTRATE JUDGE